In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-515

SAMUEL SANTORO AND JOHN TORTORA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of 15 counts of engaging in extortionate credit activities (18 U.S.C. 892-894) and conspiracy (18 U.S.C. 371). Tortora was sentenced to ten years' imprisonment on each of the substantive counts and five years on the conspiracy count, the sentences to run concurrently. Santoro was sentenced to seven years on each of the substantive counts

and to five years on the conspiracy count, the sentences also to run consecutively.[1] The court of appeals affirmed in a lengthy opinion (Pet. App. 4a-21a).

Petitioner Santoro contends that he was improperly tried in his absence. Petitioner Tortora contends that the court improperly failed to grant a continuance and to find that he was physically incompetent to stand trial. These contentions are thoroughly reviewed and properly rejected by the court below upon whose opinion we principally rely.

We would make an additional observation concerning petitioner Santoro's contention that it was prejudicial error to conduct the trial in his absence. The court below held that by his actions he had voluntarily waived the right to be present (Pet. App. 14a-21a).[2]

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[1] Santoro also was sentenced to five years' imprisonment after pleading guilty to bail jumping, to run concurrently with his other sentences (Pet. App. 5a, n. 1; 10a, n. 3).

[2] That Santoro's waiver was knowing and wilful is underscored by two facts, in addition to those alluded to by the court of appeals. First, he pleaded guilty to a bail jumping indictment, 71 Cr. 1313, which was predicated on his nonappearance on August 16, 1971. Second, at his sentencing on the present conviction, his counsel explained his absence on August 16 in these words (Transcript of Proceedings, January 25, 1972, 3-4):

> [H]e did say to me that at the time of his disappearance that he felt somewhat panicked, felt that he was being compelled to face a most serious charge where he was confronted with perhaps imprisonment for the rest of his life, in effect, and for that reason he was being compelled to trial without counsel that he felt was the only one he had confidence in, was properly prepared and qualified to defend him.

[Footnote continued on page 3]

An additional and narrower basis exists for supporting the judgment of the court of appeals. The trial court found that the trial had commenced, as scheduled long in advance, on August 10, 1971, when Santoro was present (Pet. App. 10a). The facts and a reasonable construction of Rule 43, Fed.R.Crim.P. support this conclusion.

Rule 43 provides that, in cases such as this one, "the defendant's voluntary absence after trial has commenced in his presence shall not prevent continuing the trial to and including the return of the verdict." That the "commence[ment]" of trial contemplated by the Rule 43 occurs before the swearing of the jury is evidenced by the first sentence of the Rule which states the normal rule that the defendant "shall be present * * * at every stage of the trial including the impanelling of the jury * * *." This formulation, together with the provision for continuing the trial if the defendant voluntarily absents himself following its "commencement" in his presence, reflects simply the policy that it should be clear on the record that an absent defendant had actual notice of the trial proceedings.

In this case on August 10, 1971, with 100 veniremen present, the case was called for trial. Petitioner Santoro was present in the court and the government and two other co-defendants were ready. *Voir dire*

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[2] [Continued]

For that reason he did panic and did flee with the thought and hope that perhaps this would hold the trial for a time when his counsel, counsel of his choice, Mr. Lanna, namely, would be available to defend him.

questions were submitted to the court and the government turned over statements of its witnesses to defense counsel (Tr. 17, 25, 63, 80-86). At this juncture it was impossible to impanel the jury due to the unavailability of two other co-defendants, and the trial was continued to August 16, 1971. On this latter date Santoro absented himself. In these circumstances Santoro was present when his trial "commenced" within the meaning of Rule 43. Thus, in this case it is unnecessary to consider whether deliberate failure of a defendant to appear for *any* stage of his trial can authorize conducting all the proceedings *in absentia*.

Petitioner Santoro attempts to equate this case with *Arizona* v. *Tacon*, 107 Ariz. 353, 488 P. 2d 973, certiorari granted, 407 U.S. 909. We believe that the cases are clearly distinguishable.[3] There the defendant was not present at any stage of the proceedings following his arrest. He was not present at any part of the trial which took place more than a year later. Here, by contrast, petitioner Santoro was present on August 10, 1971, but wilfully refused to return to court on August 16, because he "panic[ed]."

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[3] We note that the contentions advanced by petitioner Tortora are entirely different than those advanced by petitioner Santoro. The disposition of Tortora's petition could in no way turn on the resolution of *Tacon*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1972.

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